

IN THE SUPREME COURT OF MISSOURI

DEANNA MARIE COPELAND,)	
)	
Appellant,)	
)	Case No. SC94804
VS.)	
)	
)	
LUCAS WICKS.)	
)	
Respondent.)	

**ON TRANSFER FROM TO THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT
APPEAL NO. ED101012
ON APPEAL FROM THE CIRCUIT COURT OF
LINCOLN COUNTY, MISSOURI
FORTY-FIFTH JUDICIAL CIRCUIT**

DIVISION ONE — THE HONORABLE DAVID ASH

RESPONDENT'S SUBSTITUTE BRIEF

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II. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF DEFENDANT BECAUSE THE TRIAL COURT APPLIED THE “OBJECTIVELY REASONABLE” STANDARD IN GRANTING DEFENDANT SUMMARY JUDGMENT BASED ON QUALIFIED IMMUNITY.

III. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF DEFENDANT BECAUSE THERE WAS NO GENUINE DISPUTE OF MATERIAL FACT IN THAT SUFFICIENT FACTS WERE PRESENTED TO THE TRIAL COURT TO SUPPORT “ARGUABLE PROBABLE CAUSE” AND THAT IT WAS OBJECTIVELY REASONABLE FOR DEFENDANT TO BELIEVE THAT A CRIME HAD BEEN COMMITTED BY PLAINTIFF.

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STATEMENT OF FACTS¹

On or about March 12, 2010, the Appellant/Plaintiff Deanna Copeland (hereinafter “Plaintiff”) filed a two-count Petition for Damages in the Circuit Court of Lincoln County, Missouri, Circuit Judge Division (LF 8-11). Count I of the Petition alleges that Respondent/Defendant Lucas Wicks (hereinafter “Defendant”) submitted a false probable cause statement dated May 19, 2006, which contained “malicious misstatements of material fact”. (¶ 4 of Plaintiff’s Petition, LF 8). The Petition further alleges that Plaintiff was charged with Felony Child Abuse by the Lincoln County Prosecuting Attorney’s Office and was later acquitted of those charges after a trial by jury. (LF 8, ¶ ¶ 3, 5 of Plaintiff’s Petition for Damages). Count II of Plaintiff’s Petition claims that Defendant violated Plaintiff’s constitutional rights under 42 U.S.C. § 1983 in that Defendant misstated facts in the probable cause statement in violation of Plaintiff’s Fourth Amendment rights (LF 10, ¶ ¶ 5, 6, and 7). Defendant filed a response to Plaintiff’s Petition denying the allegations that the May 19, 2006, probable cause statement was false and asserting the affirmative defense of “qualified immunity” (LF 12-14).

The following facts were presented to the trial court through Defendant’s Motion for Summary Judgment and the Plaintiff’s response to that Motion. (LF

¹ This Statement of Facts, with the exception of the last paragraph, which addresses the Court of Appeal’s Opinion, is identical to that put forth in Respondent’s Brief that was previously filed with the Court of Appeals.

21, Wicks' Statement of Uncontroverted Facts²). Defendant was a deputy sheriff with the Lincoln County Sheriff's Department. On May 19, 2006, Defendant was contacted by the Warren County Division of Family Services to investigate a child abuse case at 8 Ricky Court in Foristell, Lincoln County, Missouri. (LF 21, ¶¶ 1 & 2 of Wicks' Statement of Uncontroverted Facts). Defendant also reviewed photographs reflecting injuries in the area of the eye and lip. (LF 21, ¶ 3 of Wicks' Statement of Uncontroverted Facts). Defendant was also told by the Division of Family Services that these injuries were non-accidental as determined by SSM Glennon Care for Kids. (LF 22, ¶ 4 of Wicks' Statement of Uncontroverted Facts). Defendant interviewed Plaintiff with another deputy sheriff. This was a custodial interview which was later transcribed. (LF 22, ¶ 5 of Wicks' Statement of Uncontroverted Facts).

After the custodial interview, Defendant prepared a probable cause statement dated May 19, 2006, and submitted that probable cause statement to the County Prosecutor, and based on the probable cause statement and photographs of the minor child, Judge T. Bennett Burkemper, Jr. issued a warrant for the arrest of Plaintiff. (LF 22, ¶ 6 of Wicks' Statement of Uncontroverted Facts).

² Defendant Lucas Wicks' Statement of Uncontroverted Facts in Support of Summary Judgment is referred to as "Wicks' Statement of Uncontroverted Facts". (LF 21-25).

Thereafter, Plaintiff was charged with a Class C Felony of Endangering the Welfare of a Child in the First Degree. (LF 22, ¶ 7 of Wicks' Statement of Uncontroverted Facts). Certain statements were made by Plaintiff during the recorded custodial interview on May 19, 2006. Those statements were set forth in Wicks' Statement of Uncontroverted Facts as follows:

33:10-15

Copeland: No. She didn't hit her head. No. When I picked her up, she didn't hit her head on anything, though, but I, I told everybody that I opened the door nicely and gently, but I didn't. It was a little, it was a little more forceful than what I told you guys.

36:13-18

Bartlett: Is it fair to say that you were really rough with her? And that's not saying anything wrong. I'm just saying, is it fair to say that you were rough with her when you went to pick her up?

Copeland: Yeah, I was.

37:16-19

Copeland: When I opened the door, I had seen her on the floor. I picked her up a little rough. I do admit that. And then I, then I stomped to the back bathroom.

46:25-47:12

Copeland: No. Now that I think of it, the bruise on her eye does consist with the door knob.

Wicks: How low is the door knob?

Copeland: It's just a round door knob.

Wicks: But she was—if she was sitting down, she's only this tall. The door knob's not, not that low.

Copeland: When I picked her up.

Wicks: Then she hit her eye on the door knob?

Copeland: It could have, possibly because I just picked her up. I was so frustrated, I picked her up, and just took her straight back there.

50:20-25

Copeland: When I went and took her in the back bathroom, I got her un – I stood her up on the side of the bathtub to get dressed – undressed and I had the bath water going. And as I was sitting on the floor, I just picked her up, and just kind of heaved her over, and as soon as I did that – she wasn't sturdy enough for me to let go, so when I did it, she slipped and fell and hit her face on the tub, and she sat there crying for a while.

51:12-13

Copeland: I heaved her – I was sitting on the floor, and I heaved her over and –

52:3-12

Copeland: I remember exactly what happened. She was crying whenever I put her in the bathtub. What happened was, whenever I took her clothes off, and her diaper off, I grabbed her underneath her arms. I was sitting on the floor and I grabbed her, and I heaved her over, and the bath water was running. Since it was running, it was very slippery in there, I guess she was – she wasn't sturdy enough when I let her go. And when I let her go, she slipped and fell. And after she slipped and fell, she was crying.

52:19-23

Copeland: I just told him that now that I was thinking about it, the bruising all up – since the bruise was all up in here on her eye, it looked consistent to the door knob on the doors to the bathroom.

53:7-13

Copeland: I was tired. Yes. I undressed her. I put her in the tub and she wasn't sturdy or steady. She slipped and fell and hit her face on the tub.

Bartlett: But that was because of – that wasn't because of her. That was because of you?

Copeland: Yes. That was because of me.
(LF 47-60, from transcribed custodial interview, also in Appx. A3-A16. The transcription labeled Exhibit E was attached to Wicks' Statement of Uncontroverted Facts).

In addition to the probable cause statement, Defendant provided photographs of the minor child to the Lincoln County Prosecutor's Office. (LF 22-23). It should be noted that Wicks' Statement of Uncontroverted Facts "1-11" were admitted by Plaintiff in Plaintiff's Response to Wicks' Statement of Uncontroverted Facts (LF 67). Defendant's Motion for Summary Judgment incorporated Wicks' Statement of Uncontroverted Facts, the Affidavit of Defendant (LF 67) and the transcript of Plaintiff's custodial interview (LF 47-60, Exhibit E of Defendant's Affidavit attached to Wicks' Statement of Uncontroverted Facts). None of these facts or the support for such facts was contested by Plaintiff. Plaintiff denied the remaining paragraphs of Wicks' Statement of Uncontroverted Facts and specifically denied the characterization by Defendant that Plaintiff's actions amounted to abuse and were merely an attempt to explain her activities. (LF 67 and 68).

On January 17, 2014, the trial court entered Judgment granting Defendant's Motion for Summary Judgment. (Appx. A1-A2). The Court found that there was no dispute as to the relevant material facts and that Defendant was entitled to qualified immunity as a matter of law.

On January 27, 2015, the Court of Appeals for the Eastern District of Missouri stated in its Opinion, that based on Federal law it would affirm the trial court's granting of summary judgment in favor of Defendant as to Plaintiff's claims filed under 42 U.S.C. § 1983, but that it would be inclined to reverse and remand the trial court's grant of summary judgment to Defendant with regard to Plaintiff's malicious prosecution claim because Missouri has a different definition of probable cause and approach to qualified immunity. This potentially different result regarding qualified immunity under Federal law and Missouri law caused the Court of Appeals to transfer this case to the Missouri Supreme Court because the Appellate Court decided this case is of general interest and importance and for the purpose of reexamining the existing law. (Supp. Appx. A-20)^{3, 4}.

³ Plaintiff inserted editorialized statements and argument into Appellant's Statement of Facts that did not appear in Appellant's Statement, Brief and Argument initially filed with the Court of Appeals. Pages 4-8 of Appellant's Substitute Brief contain numerous statements that are argumentative, not factual in nature, and are in violation of Court Rule 84.04(c). In addition, Pages 7-8 of Appellant's Substitute Brief contain argument regarding the "star track system" utilized by the Lincoln County Sheriff's Department, and such matters were never brought forth in Appellant's Brief nor presented in Appellant's argument to the Court of Appeals. Furthermore, the "star track system" was not a statement of material fact addressed in Defendant's Motion for Summary Judgment or

Defendant's Statement of Uncontroverted Facts in Support of Summary Judgment, and was not addressed in Plaintiff's response thereto.

⁴ Footnote 1 on Page 6 of Appellant's Substitute Brief does not contain facts, rather it contains argument and editorialized comments regarding 1) the Court of Appeals' review of the photographs of L.C.'s injuries; and 2) the interrogation techniques utilized by Defendant. Such argument has no place in Plaintiff's Statement of Facts and is in violation of Court Rule 84.04(c).

POINTS RELIED ON

- I. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF DEFENDANT BECAUSE THERE IS NO GENUINE DISPUTE OF MATERIAL FACT IN THAT THE PROBABLE CAUSE STATEMENT WAS SUFFICIENT TO SUPPORT “ARGUABLE PROBABLE CAUSE” AND DEFENDANT IS, THEREFORE, PROTECTED BY THE DOCTRINE OF QUALIFIED IMMUNITY.**
- II. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF DEFENDANT BECAUSE THE TRIAL COURT APPLIED THE “OBJECTIVELY REASONABLE” STANDARD IN GRANTING DEFENDANT SUMMARY JUDGMENT BASED ON QUALIFIED IMMUNITY.**

Bagby v. Brondhaver, 98 F.3d 1096 (8th Cir. 1996)

Malley v. Briggs, 475 U.S. 335 (1986)

Dowell v. Lincoln Cnty., 927 F. Supp. 2d 741, 756 (E.D. Mo. 2013)

III. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF DEFENDANT BECAUSE THERE WAS NO GENUINE DISPUTE OF MATERIAL FACT IN THAT SUFFICIENT FACTS WERE PRESENTED TO THE TRIAL COURT TO SUPPORT “ARGUABLE PROBABLE CAUSE” AND THAT IT WAS OBJECTIVELY REASONABLE FOR DEFENDANT TO BELIEVE THAT A CRIME HAD BEEN COMMITTED BY PLAINTIFF.

Dowell v. Lincoln Cnty, Mo., 762 F.3d 770, 777-78 (8th Cir. 2014)

Joseph v. Allen, 712 F.3d 1222 (8th Cir. 2013)

Technical Ordnance, Inc. v. United States, 244 F.3d 641, 647 (8th Cir. 2001)

ARGUMENT⁵

I. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF DEFENDANT BECAUSE THERE IS NO GENUINE DISPUTE OF MATERIAL FACT IN THAT THE PROBABLE CAUSE STATEMENT WAS SUFFICIENT TO SUPPORT “ARGUABLE PROBABLE CAUSE” AND DEFENDANT IS, THEREFORE, PROTECTED BY THE DOCTRINE OF QUALIFIED IMMUNITY.

*(Argument pertaining to Point Relied I is combined with that
pertaining to Point Relied on II immediately hereafter)*

⁵ The Argument section of Appellant’s Substitute Brief does not comply with Court Rule 84.04(e) because instead of listing a Point Relied On, followed by argument on each Point, Plaintiff organized her argument under subheadings A through I, without specific reference to Points Relied On I, II or III. This Brief is organized to properly address the substance of Appellant’s Substitute Brief, in accordance with Court Rules, and does not necessarily follow Plaintiff’s organization.

II. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF DEFENDANT BECAUSE THE TRIAL COURT APPLIED THE “OBJECTIVELY REASONABLE” STANDARD IN GRANTING DEFENDANT SUMMARY JUDGMENT BASED ON QUALIFIED IMMUNITY.

(Response to Appellant’s Substitute Brief Points Sections A through D)

Standard of Review

The Supreme Court is reviewing this case upon transfer by the Appellate Court, and the Appellate Court reviews summary judgment as essentially *de novo*. ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp., 854 S.W.2d 371 (1993). The determination of summary judgment is an issue of law based upon the record submitted. Allen v. Kuehnle, 92 S.W. 3d 135, 138 (Mo. App. E.D. 2002). The moving party must show that there is no genuine dispute and the non-movant must show that there are one or more material facts which give rise to a genuine dispute. Id. Although the reviewing court will give the non-movant the benefit of all reasonable inferences, the facts set forth in support of the motion are taken as true unless contradicted in the non-moving party’s response. ITT Commercial at 376.

In Pace v. City of Des Moines, 201 F.3d 1050, 1056 (8th Cir. 2000), the 8th Circuit explained the standard for reviewing the qualified immunity defense in the context of summary judgment as follows:

Courts deciding questions of qualified immunity must also recognize that whether summary judgment on grounds of qualified immunity is appropriate from a particular set of facts is a question of law. Of course, the burden remains on the proponent of the immunity to establish the relevant predicate facts, and at the summary judgment stage the nonmoving party is given the benefit of all reasonable inferences.

In the event that a genuine dispute exists concerning predicate facts material to the qualified immunity issue, the defendant is not entitled to summary judgment on that ground. What must be kept in mind, however, is that once the predicate facts have been established, for the purposes of qualified immunity there is no such thing as a “genuine issue of fact” as to whether an officer “should have known” that his conduct violated constitutional rights.

The conduct was either reasonable under settled law in the circumstances or it was not, and this is a determination of law that should be made at the earliest possible stage in litigation. (*internal citations omitted*) (emphasis added) *Id.* 1056.

B. Federal Qualified Immunity & Probable Cause Analysis

Plaintiff contends that the probable cause statement prepared and submitted by Defendant on May 19, 2006 was false and misrepresented the facts and, as a result, Defendant violated Plaintiff's Fourth Amendment protection against unreasonable seizure, as well as instigating malicious prosecution against Plaintiff. Defendant contends that his conduct is shielded under the Doctrine of Qualified Immunity.

In 42 U.S.C. § 1983 actions, an officer is entitled to qualified immunity if his conduct did not violate clearly established rights of which a reasonable person would have known. Therefore, to defeat qualified immunity, a plaintiff has the burden of demonstrating that: 1) the official's action violated a statutory or constitutional right; 2) that the right was clearly established at the time of the violation; and 3) a reasonable officer would have known his conduct violated such a right. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

In this case, the trial court granted Defendant summary judgment with regard to Plaintiff's § 1983 claim due to the application of qualified immunity. In doing so, the trial court cited to two cases in its Order that are directly on-point with the present facts. (Appx. A2). The first cited case was Bagby v. Brondhaver, 98 F.3d 1096 (8th Cir. 1996), which involved a § 1983 action where an arresting officer was accused of filing a false probable cause affidavit in order to obtain the arrest warrant. In Bagby, the 8th Circuit discussed the qualified immunity analysis as follows:

The doctrine gives ample room for mistaken judgments but does not protect the plainly incompetent or those who knowingly violate the law. A warrant based upon an affidavit containing deliberate falsehood or reckless disregard for the truth violates the Fourth Amendment. An official who causes such a deprivation is subject to § 1983 liability.

The lynchpin of qualified immunity is the public official's objective reasonableness...an objective standard that is quite amenable to qualified immunity review-whether the warrant affidavit was so materially false that defendant manifested reckless disregard for the truth in submitting it. (*internal citations omitted*) (*emphasis added*) Id. at 1098-9.

In Bagby, the 8th Circuit Court of Appeals held that if there are false or reckless portions contained in a warrant affidavit and if those statements were corrected and the affidavit still “supports a finding of probable cause,” then qualified immunity still applies to shield the arresting officer from liability. (*emphasis added*) Id. at 1099.

The other case cited by the trial court was Burleigh v. City of Detroit, 80 Fed. Appx. 454, 458 (6th Cir. 2003). (App. Appx. A2). In Burleigh, the 6th Circuit decided that exaggerated facts contained in a probable cause affidavit are insufficient to defeat qualified immunity if the other facts support a finding of probable cause. The 6th Circuit Court of Appeals held that an officer who

knowingly or recklessly submits a probable cause affidavit containing false statements may still have qualified immunity if the officer can establish he had an objectively reasonable basis for believing the facts in the affidavit were sufficient to establish probable cause. In Burleigh, the Court held that other unexaggerated facts and a review of the totality of circumstances, supported a finding of probable cause. (*emphasis added*) Id. at 458-60.

In Malley v. Briggs, 475 U.S. 335 (1986), an officer was accused of providing the judge with an affidavit for an arrest warrant that was allegedly devoid of probable cause. Plaintiff's Substitute Brief also cites to this case (App. Sub. Br., p. 21). In Malley, the United States Supreme Court discussed the objective standard to be applied to qualified immunity and opined that qualified immunity, in this context, will protect all but those who are "plainly incompetent" or "knowingly violate the law". In Malley, the Supreme Court held:

Defendants will not be immune if, on an objective basis, it is obvious that no reasonably competent officer would have concluded that a warrant should issue; but if officers of reasonable competence could disagree on this issue, immunity should be recognized. (*internal citations omitted*) (*emphasis added*) Id. at 1096.

Only where the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable will the shield of immunity be lost. (*internal citations omitted*) (*emphasis added*) Id. at 1098.

Missouri courts and the Federal courts have traditionally resolved the question of qualified immunity by making the initial inquiry at the summary judgment stage. State ex rel. Wilhoit v. Seay, 248 S.W.3d 135 (Mo. App. 2008). The question of qualified immunity is a threshold question and the focus by the Court is whether or not the action by the police officer violated a Constitutional right. Qualified immunity excuses the liability of a law enforcement officer who makes a reasonable mistake in the exercise of his official duties. Wilhoit at 138. An officer is entitled to qualified immunity if his mistakes are based on an objectively reasonable belief that the suspect committed a criminal offense. McCabe v. Parker, 608 F.3d 1068, 1078 (8th Cir. 2010).

In order for Plaintiff to challenge the probable cause statement, Plaintiff must show that Defendant included a false statement or omitted a truthful statement from the affidavit and that the affidavit would not establish probable cause if the false information is supplemented or corrected. United States v. Mashek, 606 F.3d 922, 928 (8th Cir. 2010). The officer is entitled to qualified immunity if he had “arguable probable cause” which may be a mistaken but objectively reasonable belief that Plaintiff had committed a criminal offense. McCabe v. Parker, 608 F.3d 1068, 1078 (8th Cir. 2010).

“Probable cause exists when the facts and circumstances within a police officer's knowledge and of which the officer had reasonably trustworthy information were sufficient to warrant a reasonable officer in believing the person

arrested committed a crime.” (*internal citations omitted*) (*emphasis added*) Pace at 1055 (8th Cir. 2000). In Pace, the 8th Circuit held:

When the plaintiff in an action under § 1983 contends that an officer acted without probable cause, the officer is entitled to qualified immunity unless the “warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable. As this standard makes clear, there need not be actual probable cause for an officer to be shielded by qualified immunity; an objectively reasonable belief that there was probable cause is enough. (*internal citations omitted*) (*emphasis added*) Id. at 1055-56.

In Dowell v. Lincoln Cnty., Mo., 762 F.3d 770, 777-78 (8th Cir. 2014) the plaintiff alleged the law enforcement officer violated his 4th Amendment rights by filing a probable cause statement to support an arrest warrant for rape which did not indicate he had been acquitted of the murder of the same victim or that the coroner believed the victim’s injuries could have resulted from consensual sex.

The Court held:

It is clearly established that a warrantless arrest, unsupported by probable cause, violates the Fourth Amendment. To challenge probable cause, a plaintiff must show (1) police deliberately or recklessly included a false statement, or omitted a truthful statement from the affidavit; and (2) the affidavit would not establish probable cause if the allegedly false information is ignored or the omitted

information is supplemented. The Officer is entitled to qualified immunity if he had merely *arguable* probable cause, which is a mistaken but objectively reasonable belief the suspect committed a criminal offense. In that case it was undisputed that Detective Bartlett's second probable cause statement did not contain references to Dowell's acquittal or Dr. Case's expanded trial testimony indicating consensual sex could have caused the lacerations on Hogland's genitalia. The Court, therefore, had to determine whether Detective Bartlett's probable cause statement would still establish probable cause if the information had been included. The determination of probable cause is made after considering the totality of the circumstances.

Looking to the totality of the circumstances, Detective Bartlett's second probable cause statement would still have established probable cause if the omitted facts had been included. The facts contained in the second probable cause statement included (1) Hogland's partially clothed body; (2) bruising on the arms and hands indicating the assailant forcefully held Hogland; (3) numerous lacerations to the head and face along with closed-head trauma as cause of death; and (4) semen found on Hogland's underwear matching Dowell's DNA sample. We find these facts to warrant reasonable grounds for believing Dowell had raped Hogland.

(*internal citations omitted*) (*emphasis added*) Dowell v. Lincoln Cnty., Mo., 762 F.3d 770, 777-78 (8th Cir. 2014).

In Technical Ordnance, Inc. v. United States, 244 F.3d 641, 647 (8th Cir. 2001), the 8th Circuit also provided :

A warrant issued on the basis of an affidavit that supports probable cause based entirely on deliberate or reckless falsehoods or omissions violate the Fourth Amendment. However, although a false statement or omission is included in the affidavit, the Fourth Amendment is not violated if the affidavit would still show probable cause after such falsehood or omission is redacted or corrected. (*internal citations omitted*) (*emphasis added*). Id.

Appellees claim Moore set out Hoffman's statements in a manner designed to mislead a magistrate into believing that Hoffman had lied during the March 20 inspection...Counsel argued that this was misleading because the summary is probably the only section that anyone read. The Court concluded that the argument was sheer speculation. (*internal citations omitted*) Id. at 648-9.

Appellees have not shown any genuine issue of material fact as to whether Moore intentionally or recklessly made misstatements or omissions in his affidavit. Imprecision in the affidavit may show that Moore was careless in drafting some of the language, but careless error does not show reckless or intentional misconduct. Neither does

the fact that Moore may have used somewhat different language in recounting Hoffman's statements in his grand jury testimony than that used in his affidavit. (*emphasis added*) Id. at 650.

To overcome Moore's defense of qualified immunity, the Court stated that appellees must show that a material fact or question of law precludes summary judgment. Because Moore's motive is at issue, the plaintiffs may not respond simply with general attacks upon Moore's credibility, but rather must identify affirmative evidence from which a jury could find that the plaintiffs have carried their burden of proving the pertinent motive...We do not question that appellees themselves hold a sincere belief that ATF targeted them because of their opinion that they should be free of its regulation, but they have not made the requisite showing that Moore's conduct was the result of an improper motive or in retaliation. Moore is entitled to qualified immunity on this claim. (*internal citations omitted*) (*emphasis added*) Id. at 652.

Similarly, in the present case, here there is no evidence in the record of evil motive or underlying malicious activity. The fact that a law enforcement officer is seeking to find evidence to support a potential arrest and prosecution is certainly a major component of a law enforcement officer's job.

C. Plaintiff's Cases Distinguished

Plaintiff cites to Burk v. Beene, 948 F.2d 489 (8th Cir. 1991) to argue that she must only show a “material misstatement of fact”, and without the statement there would be no probable cause in order to defeat qualified immunity. This analysis is in error. In Burk, the Court decided that the statements in a affidavit that supported an arrest warrant were false and that the statements were not objectively reasonable. The affidavit in Burk contained blatantly false statements that she should have known were false at the time she prepared the affidavit. It should also be noted that the affiant in Burk was not a law enforcement officer, but rather acting in an official capacity as a state-level director. In Burk the Court determined that there was no factual basis whatsoever to support the fact statements made in the affidavit. This is dissimilar from our present case where there was a factual basis to support most, if not all, of the probable cause statement.

The Court in Burk, citing Franks v. Delaware, 438 U.S. 154 (1978), stated that an affidavit to establish probable cause must be “truthful in the sense that the information put forth is believed or appropriately accepted by the affiant as true”. In the present case there was a plethora of facts that establish a reasonably objective basis upon which Defendant determined there was probable cause that the Plaintiff committed a crime.

Plaintiff also cites to the United States Supreme Court case Devenpeck v. Alford, 543 U.S. 146 (2004), to support her argument that different probable cause

standards apply to cases involving a warrant. Devenpeck does stand for the rule that when there is no arrest warrant, probable cause is gleaned from reasonable conclusions to be drawn from the facts known to the arresting officer at the time of the arrest. Id. However, Plaintiff's argument that this test is different and wholly separate from the "corrected affidavit" test discussed above, is in error. Plaintiff's interpretation of Devenpeck and its application in the Appellant's Substitute Brief is in error because the Courts in Bagby, Pace, Malley and Burleigh, as cited and discussed above, all stand for the proposition that the "corrected affidavit test" provides for corrections based on other accurate information known by the arresting officer at the time of the affidavit and incorporates other facts given the totality of the circumstances. The two tests co-exist and were not confused by the trial court or Court of Appeals as argued by the Plaintiff.

Plaintiff also cites to Albright v. Oliver, 510 U.S. 266 (1994) to support her argument that her arrest or seizure was unconstitutional, but Albright is not a Fourth Amendment case, its' holding decided no issues pertaining to any Fourth Amendment claims, which are the crux of Plaintiff's § 1983 claim at issue here, which makes this case applicable.

D. Application of Law to the Present Case

The thrust of Plaintiff's argument is that the probable cause statement was false because Defendant used the term "threw" rather than "heave", when referring to placing the minor child in the bathtub (LF 59, Custodial Interview of Plaintiff at 50:21-25) and further that the probable cause affidavit stated that she "slammed" the minor child's head into the door knob due to anger. Although she did not specifically state that she "slammed" the minor child's head into the door knob, Plaintiff did admit in portions of the lengthy custodial interview that she was really rough with her and that she did not open the door nicely and gently but rather was forceful. She further stated that she was frustrated and picked her up and took her straight back there and admitted that the bruised eye was consistent with the door knob. (LF 55, Custodial Interview of Plaintiff at 33:10-15; LF 58, Custodial Interview of Plaintiff at 46:25; 47:1-15). With or without the specific terms of "heaved" and "slammed" used in the affidavit of probable cause, it was objectively reasonable for Defendant to believe that Plaintiff had committed a crime.

The facts presented to the trial court, in part through the transcript of the custodial interview attached to Wicks' Statement of Uncontroverted Facts, provided the trial court with a series of admissions by the Plaintiff concerning her activities with the minor child in the early morning hours (4:30 a.m.) after she returned from work. (LF 49, Custodial Interview of Plaintiff at 9:12-15). Plaintiff admitted that she entered the bathroom to discover toilet paper thrown about. She

admitted that her actions with the minor child were a little more forceful than what she previously stated (LF 55 at 33:10-15). She admitted that she was rough when she picked up the minor child and that the bruise on the child's eye was consistent with the door knob (LF 58 at 46:25-47:12). Plaintiff also admitted that she "grabbed her underneath her arms. I was sitting on the floor and I grabbed her and heaved (emphasis added) her over and the bath water was running." (LF 59 at 50:20-51:20). She went on to state that "she (the minor child) wasn't sturdy enough when I let her go, and she slipped and fell." Plaintiff further admitted that the "bruise was all up in her (minor child) eye". She admitted that she (Plaintiff) was tired (LF 60 at 53:7-10).

Even if the probable cause statement was modified and corrected to state that Plaintiff "heaved" the minor child, the officer would still have arguable probable cause to believe that a criminal offense had been committed. The officer's analysis is not based on evidence that would necessarily be presented at trial. It is the prosecuting attorney's obligation to determine the appropriate facts to present to a jury. The law enforcement officer has the duty to reasonably inquire and investigate facts. Defendant's investigation included statements by Plaintiff, information from the Warren County Division of Family Services confirming that the child's injuries were not accidental and the photographs depicting the nature of the injuries to the child. These facts combine to provide probable cause to believe that a crime had been committed.

The officer is not charged with the responsibility of making a *prima facie* showing of criminal activity. United States v. Wallraff, 705 F.2d 980 (8th Cir. 1983). Nor did Defendant have the benefit of a transcribed interview to refer back to for exact quotes. An officer who arrests someone with probable cause is not liable for false or unlawful arrest simply because the innocence of the suspect is later proved, because the Constitution does not guarantee that only the guilty will be arrested.

Plaintiff argues that the trial court should have viewed Plaintiff's statements during her interrogation in a light most favorable to Plaintiff. This is not the law nor is it the standard. This Court and the trial court look at the facts as presented in the Motion for Summary Judgment in a light most favorable to the non-movant in order to determine whether the record presents a genuine dispute as to material facts.

The Trial Court did not dissect the custodial interview to determine whether or not the statements by Plaintiff in her custodial interview could be used to infer that she did not abuse the minor child. In other words, the court is not analyzing the credibility of the statements of the Plaintiff to determine her guilt or innocence. Instead the court looks to the "objective reasonableness" of the officer's statements in his affidavit given what he knew or should have known at the time the probable cause statement was drafted and signed.

In determining probable cause, it is necessary to look at the totality of the circumstances, and, in this case, even if the wording was changed to more

concisely reflect the specific statements in the custodial interview, given the injuries to the minor child, the circumstances surrounding the event and the statements by Plaintiff that she was frustrated, that she handled the minor child roughly, was angry and tired and used more force than what she had told the officers originally, there is still a basis for probable cause to believe that a crime had been committed. In the present case, given the statements by the Plaintiff, the photographs, interview of Plaintiff, and the statements of the Division of Family Services, the arresting officer had an objectively reasonable basis to believe Plaintiff committed a criminal offense. (Appx. A2, Sub. Appx. A5-A9).

Since a “corrected affidavit” in this case still established objectively reasonable probable cause, Defendant is entitled to summary judgment on the issue of qualified immunity, as ordered by the Trial Court in this case.

E. Procedural History

The Trial Court granted summary judgment to the Defendant on all counts in this case on the basis of qualified immunity. The Trial Court held as follows:

1. There is no dispute as to the material facts;
2. The statements in the probable cause statement submitted by Defendant were not so much different that the failure to directly quote the Plaintiff amount to malicious disregard of the truth and other evidence submitted with the probable cause statement provided probable cause;
3. Defendant is entitled to qualified immunity; and

4. Summary judgment in favor of the Defendant is appropriate. (Appx A2.)

The Court of Appeals Opinion provided that it would uphold the trial court's decision granting the Defendant qualified immunity with regard to the § 1983 claim, as follows:

As to the [Plaintiff's] § 1983 claim, we conclude that the detective's probable cause statement, when corrected of misstatements, supported probable cause to believe that the mother had committed a crime against the child resulting in the child's injury, and that the detective is entitled to qualified immunity. (Sub. Appx. A5)

For the foregoing reasons, Defendant respectfully requests that this Court affirm the Order of the Court of Appeals and the Judgment of the Trial Court.

III. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF DEFENDANT BECAUSE THERE WAS NO GENUINE DISPUTE OF MATERIAL FACT IN THAT SUFFICIENT FACTS WERE PRESENTED TO THE TRIAL COURT TO SUPPORT “ARGUABLE PROBABLE CAUSE” AND THAT IT WAS OBJECTIVELY REASONABLE FOR DEFENDANT TO BELIEVE THAT A CRIME HAD BEEN COMMITTED BY PLAINTIFF.

A. Missouri Qualified Immunity

Official immunity protects public officials from liability for alleged acts of ordinary negligence committed during the course of their official duties for the performance of discretionary acts. Davis v. Lambert-St. Louis Int'l Airport, 193 S.W.3d 760, 763 (Mo. 2006). Official immunity is a qualified immunity that does not extend to malicious acts. The Court in Davis, held that qualified immunity applies to malicious prosecution actions, as follows:

[O]fficial immunity is a qualified immunity and does not apply to those discretionary acts done in bad faith or with malice...In granting the motion for summary judgment, the trial court found, the record is barren of any suggestion of ulterior motive...or of any evidence warranting an inference of actual or legal malice...A party opposing a motion for summary judgment must set forth, by

affidavit or otherwise, specific facts showing a genuine issue for trial. Rule 74.04(e). Plaintiff has not identified such facts...summary judgment was properly granted. (*internal citations omitted*) (*emphasis added*) Davis at 688-690.

“Under the official immunity doctrine bad faith embraces more than bad judgment or negligence; it imports a dishonest purpose, moral obliquity, conscious wrongdoing, breach of a known duty through some ulterior motive or ill will partaking of the nature of fraud.” McCormack v. Douglas, 328 S.W.3d 446 (Mo. Ct. App. 2010).

B. Malicious Prosecution Claim Under Missouri Law

There is overlap in the analysis for official/qualified immunity under Missouri law and the analysis of state law malicious prosecution claims. The overlap is the “malice” component. Pursuant to Missouri law, a plaintiff can only defeat a police officer’s entitlement to qualified immunity for acts done during the course of his/her official duties by offering proof of malice and malice is also one of the six (6) elements of malicious prosecution. Furthermore, a finding of probable cause, which will entitle a § 1983 defendant to qualified immunity, also entitles a malicious prosecution defendant law enforcement officer to summary judgment for malicious prosecution claims.

To succeed on a claim for malicious prosecution filed under Missouri law, the plaintiff must plead and prove: (1) the

commencement of a prosecution against the plaintiff; (2) the instigation by the defendant; (3) the termination of the proceeding in favor of the plaintiff; (4) the want of probable cause for the prosecution; (5) the defendant's conduct was actuated by malice; and (6) the plaintiff was damaged. (*internal cites omitted*) (*emphasis added*) Dowell v. Lincoln Cnty., 927 F. Supp. 2d 741, 756 (E.D. Mo. 2013) aff'd sub nom. Dowell v. Lincoln Cnty., Mo., 762 F.3d 770 (8th Cir. 2014).

Malicious prosecution actions have never been favorites of the law as sound public policy dictates that the law should encourage the uncovering and prosecution of criminal activity. Strict proof of each element of the tort is required. (*internal citations omitted*) (*emphasis added*) Baker v. St. Joe Minerals Corp., 744 S.W.2d 887, 889 (Mo. Ct. App. 1988).

C. Proof of Probable Cause and Legal Malice are Required

“Under Missouri law, the standard to determine if an arrest is lawful is probable cause, defined in terms of facts and circumstances sufficient to warrant a prudent man in believing that the suspect had committed or was committing an offense...” Buckler v. Johnson Cnty. Sheriff's Dep't, 798 S.W.2d 155, 157 (Mo. Ct. App. 1989), abrogated on other grounds by Kuenzle v. Missouri State Highway Patrol, 865 S.W.2d 667 (Mo. 1993).

In State v. Heitman, 589 S.W.2d 249 (Mo. 1979), this Court defined probable cause as follows:

An arrest with or without a warrant requires probable cause, which simply means a knowledge of facts and circumstances sufficient for a prudent person to believe the suspect is committing or has committed an offense...While the quantum of information necessary to fashion probable cause means more than mere suspicion, its existence must be determined by practical considerations of everyday life on which reasonable persons act and not the hindsight of legal technicians...All information known to the officers and the reasonable inferences therefrom bear on the determination of that issue. (*internal citations omitted*) (*emphasis added*) Id. at 253.

In Simpson v. Indopco, Inc., 18 S.W.3d 470, 474 (Mo. App. 2000), the Missouri Western District Court of Appeals explained review of probable cause under malicious prosecution claims, as follows:

The probable cause to initiate criminal proceedings sufficient to rebut a claim of malicious prosecution is reasonable grounds for suspicion, supported by circumstances in evidence sufficiently strong to warrant a cautious man in his belief that the person accused is guilty of the offense charged...Where the facts pertaining to the issue are not in dispute, the determination of whether probable cause

existed is a question of law for the court, and not a question of fact for the jury. (*internal citations omitted*) (*emphasis added*) Id.

In Perry v. Dayton Hudson Corp., 789 S.W.2d 837, 841 (Mo. App. 1990), the Missouri Eastern District Court of Appeals explained the phrase “reasonable grounds” and its application to the malicious prosecution analysis excerpted below:

Reasonable grounds means that under the circumstances an ordinarily careful and prudent person after having made a reasonable inquiry would have believed the facts alleged and that the judicial proceeding was valid. Id.

In Kurtz v. City of Shrewsbury, 245 F.3d 753 (8th Cir. 2001), the Eighth Circuit stated that to survive summary judgment on an action for malicious prosecution in Missouri, a plaintiff must establish that 1) the prosecution lacked probable cause; and 2) the officer's conduct was actuated by malice. Id. at 757. Kurtz involved § 1983 and state law malicious prosecution claims stemming from an arrest. In Kurtz the Court stated that under Missouri law:

Legal malice is defined as any improper motive, and thus, a plaintiff must prove that a defendant initiated prosecution for purposes other than bringing an offender to justice. (*emphasis added*) Id.

See also Bramon v. U-Haul, Inc., 945 S.W.2d 676, 684 (Mo. App. 1997), for the holding that “the defendant initiated the prosecution for a purpose other

than that of bringing an offender to justice” as being the proper level of malice required for malicious prosecution claims.

In the Dowell case, as discussed above, the trial court granted the arresting officer summary judgment on the issue of qualified immunity for § 1983 claims and for a Missouri state law claim of malicious prosecution. In that case the 8th Circuit Court of Appeals affirmed the trial court, holding that:

Because we conclude Detective Bartlett's probable cause statement would provide probable cause even if the omitted references had been included, the district court did not err by granting summary judgment to Defendants on those claims. Dowell v. Lincoln Cnty., Mo., 762 F.3d 770, 778 (8th Cir. 2014).

In Dowell neither the trial court nor the Eighth Circuit conducted an additional probable cause analysis beyond that done for the plaintiff's § 1983 claims, and held that if there was probable cause for the Federal claim that the same would follow for the state claim, thus entitling the defendant to qualified immunity.

Federal District Courts often follow the Dowell analysis and hold that if probable cause exists to defeat a § 1983 claim, then it also exists to defeat a state law claim of malicious prosecution. See Hazlett v. City of Pine Lawn, 2014 WL 2441372 (E.D. Mo. 2014); Helmig v. Fowler, 2014 WL 4659381 (W.D. Mo. 2014); Pitts v. City of Cuba, 910 F. Supp. 2d 1161 (E.D. Mo. 2012).

Joseph v. Allen, 712 F.3d 1222 (8th Cir. 2013), is another Eighth Circuit case that involved claims filed under 42 U.S.C. § 1983 and under Missouri law for malicious prosecution. In Joseph, the district court granted and the Court of Appeals affirmed the police officer defendants having summary judgment on the issue of qualified immunity. The Eighth Circuit held that “probable cause is defined identically under Missouri law and federal law.” Id. at 1228. (quoting State v. Tokar, 918 S.W.2d 753, 767 (Mo. banc 1996)) The Court held that if officers have probable cause to believe a crime was committed, then the plaintiff cannot prevail on Missouri state law claims for malicious prosecution.(*emphasis added*) Id.

The Missouri Appellate Court case of Davis v. Bd. of Educ. of City of St. Louis, 963 S.W.2d 679, 685 (Mo. App. 1998) also involved a malicious prosecution claim where the appellant argued that the record did not support a finding of probable cause. This Court disagreed holding that:

Whether these facts are sufficient to establish the lack of probable cause is a question of law for the court...There were no probative facts in the record to support a finding of a lack of probable cause...The trial court did not err in entering judgment notwithstanding the verdict on plaintiff's malicious prosecution claim against defendants...(internal citations omitted) (*emphasis added*) Id. at 687-88.

The Eighth Circuit Court of Appeals similarly granted summary judgment in Zike v. Advance Am., Cash Advance Centers of Missouri, Inc., 646 F.3d 504 (8th Cir. 2011):

The district court granted Advance America's motion for summary judgment ...the district court concluded that Zike failed to create genuine issues of material fact as to either (1) the lack of probable cause for his theft prosecution or (2) the fact that the prosecution was terminated in Zike's favor. Both of these are required elements that a plaintiff must prove in order to prevail on a claim of malicious prosecution under Missouri law. Likewise, because the lack of probable cause is also a required element of a false arrest claim under Missouri law, the district court granted summary judgment on that claim as well. (*internal citations omitted*) (*emphasis added*) Id. at 509.

Where the facts of a malicious prosecution claim are undisputed—as is arguably the case here—whether defendants like Advance America possessed probable cause is a question of law for the court, not a question of fact for the jury. (*internal citations omitted*) Id. at 509-10.

The Zike case, like the present case, also dealt with alleged errors and discrepancies with probable cause testimony, and the Eighth Circuit held that immaterial issues will not defeat a finding of probable cause, as follows:

The trial court correctly dismissed all of these discrepancies as both immaterial to the magistrate's determination of probable cause and unknowingly false. (*internal citations omitted*) Id. at 509.

...Zike failed to create a genuine issue of material fact as to Advance America's lack of probable cause, and therefore the trial court's grant of summary judgment on Zike's malicious prosecution claim was proper on that basis. (*internal citations omitted*) Id. at 511-12.

D. Plaintiff's Cases Distinguished

Plaintiff cites to Kalina v. Fletcher, 522 U.S. 118 (1997) as standing for the proposition that the test for immunity under § 1983 and the test for immunity under state law are substantially different; however, the body of the Kalina case does not stand for this sentiment. Rather, it is case that outlines absolute immunity afforded to prosecuting attorneys.

Plaintiff also cites to Haswell v. Liberty Mut. Ins. Co., 557 S.W.2d 628 (Mo. 1977) to support her argument that the probable cause analysis in Missouri is different from the Federal analysis applicable to 42 U.S.C. § 1983 claims. However, Plaintiff's argument is not persuasive because this case is not on-point and involves the alleged wrongful initiation of a civil action, not a criminal action,

does not involve an arrest warrant, and does not involve the action of police officers, who are permitted to act based on criminal law standards. Plaintiff also cites to Diehl v. Fred Weber, Inc., 309 S.W.3d 309 (Mo. Ct. App. 2010), which, for the same reasons as Haswell, is not persuasive.

E. Application of Law to the Present Case

In Appellant's Substitute Brief, Plaintiff argues that the definitions of probable cause applicable to her § 1983 claim and her Missouri malicious prosecution claim are not the same, but cites no persuasive case law that supports this position. To the contrary, the case law cited above provides that an objective reasonableness standard is used to determine probable cause both under Federal and Missouri law, and that the courts consistently use the same analysis. As outlined above, Plaintiff's argument is in error because courts consistently find that if probable cause exists to entitle a police officer to qualified immunity under § 1983, then, in turn, there is no foundation for a malicious prosecution claim.

Plaintiff also wrongfully argues that there was sufficient evidence of malice to 1) defeat Defendant's right to a qualified immunity defense; and 2) to survive summary judgment on the malicious prosecution claim.

Plaintiff, beginning on Page 36 of Appellant's Supplemental Brief, argues that evidence of malice sufficient to overcome the Defendant's official qualified immunity is as follows:

1. Defendant at least acted recklessly with regard to statements made in the probable cause statement;

2. A reasonable juror could infer from the record that the Defendant acted “maliciously” and with “evil intentions” based on the following:
 - a. Defendant switched his investigation from being directed at Tony Killian, Plaintiff’s boyfriend, to Plaintiff because he could make an easier case with her;
 - b. Defendant believed closing the case by arrest and obtaining a conviction would help his career and his own monetary gains because his performance was being tracked by the star track system;⁶
 - c. Defendant focused his investigation on Plaintiff with the purpose of coercing a false confession out of her because he believed she was of below average intelligence and easily manipulated. (App. Sub. Br., p. 39)

This argument put forth by Plaintiff is just that – argument, and such arguments are not supported by any statement of facts, affidavit, testimony or

⁶ Plaintiff’s reference to the “star track system” of monitoring police officers was not addressed by Plaintiff in her initial Appellant Brief or argument before the Court of Appeals. In addition, contrary to Plaintiff’s unsupported argument, Defendant’s own testimony shows that he did not believe the “star track monitoring system” entitled officers to monetary raises or promotions.(LF 127-8)

other evidence in the record. Mere speculation is never enough to survive summary judgment because:

Rule 74.04(e) provides that when a motion for summary judgment is made and supported by pleadings, depositions, admissions on file, and affidavits an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this Rule, must set forth specific facts showing that there is a genuine issue for trial. (*internal citations omitted*) (*emphasis added*) Baker v. St. Joe Minerals Corp., 744 S.W.2d 887, 888 (Mo. Ct. App. 1988).

The case law cited above is clear that to defeat official immunity the level of malice required is proof of “a dishonest purpose, moral obliquity, conscious wrongdoing, breach of a known duty through some ulterior motive or ill will”. There is no evidence in the record before this Court that supports such a high threshold of malice. Contrary to the Plaintiff’s arguments, at best, there is evidence that Defendant was negligent in drafting part of the probable cause statement upon which a warrant was issued for Plaintiff’s arrest.

In addition, Plaintiff’s argument that her allegation that Defendant “acted maliciously and with evil intentions” is sufficient for her malicious prosecution claim to survive summary judgment is in error because Missouri law requires strict

proof of malice at the summary judgment stage, which requires more than conclusory allegations.

Furthermore, the case law cited above also makes it clear that the level of malice required for malicious prosecution is that “the defendant initiated the prosecution for a purpose other than that of bringing an offender to justice” and, likewise, for the same reasons stated above, there is no evidence in the record before this Court that supports such a finding.

Plaintiff also tries to convince this Court that during summary judgment Defendant did not assert that Plaintiff failed to make a submissible case on the elements of her malicious prosecution claim and, therefore, review of the same is not before this Court. However, Plaintiff’s argument is in error because the issues of probable cause and malice, both elements of malicious prosecution, were before the Trial Court and the Court of Appeals. Also, Defendant’s Memorandum of Law In Support of His Motion for Summary Judgment (LF 31) affirmatively asserts that there is no evidence of malice in the record, and, in response, Plaintiff argued that malice in this case can be inferred from the lack of probable cause. (LF 84). With qualified immunity, probable cause, and malice, all being the issues addressed as part of summary judgment by the Trial Court, and in the parties’ Appellate briefs, the Plaintiff cannot now argue that such matters are not also before this Court.

F. Procedural History

The Trial Court granted summary judgment to the Defendant on all counts in this case based on qualified immunity. (Appx. A2)

The Court of Appeals' Opinion provided that while it would uphold the Trial Court's decision granting the Defendant qualified immunity with regard to Plaintiff's § 1983 claim, it would reverse the Trial Court's decision with regard to the state claim as follows:

As to the [Plaintiff's] malicious prosecution claim, however, we are compelled to reach a different result [than the § 1983 claim]. Federal cases analyzing § 1983 claims and Missouri cases analyzing state malicious prosecution claims define the term "probable cause" differently. Missouri also employs a different approach to official immunity than the federal courts employ with qualified immunity. As a result, we would reverse and remand the trial court's grant of summary judgment to the defendant in connection with the malicious prosecution claim. However, because of this anomalous result [granting Defendant qualified immunity on the federal claim but not on the state law claim], we transfer this case to the Missouri Supreme Court due to its general interest and importance and for reexamination of existing law. (Sub. Br. Appx. A5-A6)

In its Opinion, the Court of Appeals provided that a defendant in a malicious prosecution suit may establish a right to summary judgment by showing facts that negate any one of plaintiff's elements, but the Court then went on to say that "the parties have only addressed the probable cause element." (Sub. Br. Appx. A16). However, as discussed above, this position is inaccurate because malice was directly addressed by the parties during summary judgment, argument, in the Trial Court's Judgment, and in the parties' briefs filed with the Appellate Court. Furthermore, it is the Plaintiff's burden to prove malice in order to overcome Missouri official immunity, and any absence of proof of malice will benefit Defendant, not strip him of his immunity.

The Court of Appeals mistakenly held that official immunity did not shield the Defendant from Plaintiff's state law claim of malicious prosecution because the definition of probable cause in Missouri is different than the definition of probable cause used by Federal Courts in § 1983 actions. The Appellate Court came to this conclusion utilizing the definition of probable cause contained in Haswell v. Liberty Mut. Ins. Co., 557 S.W.2d 628, 633 (Mo. 1977), which provides:

Probable cause for the initiation of a criminal prosecution is reasonable cause and may be defined as the existence of such a state of facts as would warrant an ordinarily cautious and prudent man in the belief that the accused was guilty of the offense charged.
(*internal citations omitted*) (*emphasis added*) Id.

In addition to Haswell, the Court of Appeals cited to a handful of other cases to support the use of this definition of probable cause when analyzing claims of malicious prosecution filed under Missouri law; however, it must be noted, that all of these cases are insurance cases, do not involve law enforcement officers, do not involve officer drafted probable cause statements, and are therefore not particularly helpful in determining how to apply the definition of probable cause to the present case. (See Sub. Br. Appx A17-A18).

Due to Haswell's definition of probable cause and the Court of Appeals' earlier-discussed finding that a "corrected affidavit" only provided probable cause for a misdemeanor, rather than the felony Plaintiff was actually charged with, the Court held that there was no probable cause that Plaintiff was guilty of the offense charged. In turn, the Court of Appeals held that it could not affirm the trial court's decision with regard to the malicious prosecution claim.

The Court of Appeals' analysis on this issue is misplaced because, pursuant to Missouri and Federal case law cited above by Defendant, both Federal law and Missouri law utilize an objectively reasonable test for determining probable cause. Furthermore, as the Court properly points out, the Defendant as the arresting officer had no choice/power/control over the offense that the Plaintiff was ultimately charged with, and thus should not be bound by the prosecutor's decision to pursue felony charges. Rather, the Defendant should only be bound by what he did attest to, which was that he had probable cause to believe Plaintiff "committed criminal offenses in Lincoln County" (LF 43).

The Court of Appeals also decided that it would not affirm the Trial Court's grant of qualified immunity to Defendant for Plaintiff's malicious prosecution claim because official immunity in Missouri is inapplicable to official acts done in bad faith or with malice. In its Opinion, the Court of Appeals stated:

We have already determined in our analysis of the mother's § 1983 claim that, in reviewing the record in the light most favorable to the [Plaintiff], the [Defendant's] statement that the Plaintiff "stated she slammed L.C.'s head into the doorknob due to anger" is unsupported by the record and suggests a reckless disregard for the truth. (Sub. Br. Appx., A18).

However, rather than recklessness, the Missouri case law cited above holds that the level of malice needed to overcome official immunity is proof of "a dishonest purpose, moral obliquity, conscious wrongdoing, breach of a known duty through some ulterior motive or ill will." Therefore, the Court's own finding of recklessness is insufficient to overcome official immunity under these circumstances.

The Appellate Court also included in its Opinion:

...[B]ecause the parties did not address the malice element in any substantial manner, the content of the summary judgment record before us is not such that it would allow a court to determine whether the detective acted in bad faith or with malice when he

included this contention in his probable cause statement.” (Sub. Br. Appx., A18)

Therefore, the Court of Appeals affirmatively acknowledges that Plaintiff offered no evidence of malice sufficient to overcome official immunity under Missouri law, but curiously still denied Defendant qualified immunity even though mere allegations or speculation are insufficient. Since Plaintiff has the burden, any evidence of malice lacking in the record, must be borne by Plaintiff and the Court of Appeals should have affirmed the Trial Court’s grant of official immunity.

The Court of Appeals transferred this matter to the Missouri Supreme Court because it was concerned that its holdings caused: 1) Missouri official immunity to no longer effectively shield police officers from liability for state law malicious prosecution claims due to the inclusion of “for the offense charged” language in the definition of probable cause; and 2) This definition of probable cause places too high a burden on police officer defendants who do not choose or control the charges to be applied to criminal defendants.

Defendant disputes the Court of Appeals’ holdings and argues that the definition of probable cause under Missouri law and Federal law should be applied in the same manner, thus entitling the Defendant to qualified/official immunity on both of Plaintiff’s claims. Defendant also believes that the Trial Court’s grant of summary judgment should stand due to Plaintiff’s failure to make a submissible case of malicious prosecution because the record lacks evidence of probable cause or malice.

CONCLUSION

For each of the foregoing reasons, the Defendant respectfully requests that this Court affirm the Judgment of the Trial Court granting Defendant's motion for summary judgment finding that Defendant's probable cause statement was objectively reasonable, and that Defendant is shielded by the Doctrine of Qualified Immunity with regard to Plaintiff's 42 U.S.C. § 1983 claim and malicious prosecution claim.

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CERTIFICATE OF COMPLIANCE AND SERVICE

Joel D. Brett, attorney for Respondent, hereby certifies that he is in compliance with Rule 55.03, that this brief is in compliance with the limitations contained in Rule 84.06(b), that Respondent's brief contains 9,856 words, that the brief was prepared using Microsoft Word 13 point Times New Roman font. I hereby certify that I electronically filed Respondent's Substitute Brief through the Missouri eFiling System this 10th day of March, 2015, and that notification of such filing will be sent to Appellant's attorney, John D. James, cjlaw@charliejames.com.

/s/ Joel D. Brett
Joel D. Brett